

3993 Howard Hughes Parkway, Suite 600
Las Vegas, NV 89169-5996
Facsimile (702) 949-8321
Telephone (702) 949-8320

Robert M. Charles, Jr. NV State Bar No. 006593
Email: rcharles@lrlaw.com
John Hinderaker AZ State Bar No. 018024
Email: jhinderaker@lrlaw.com
Marvin Ruth NV State Bar No. 10979
Email: mruth@lrlaw.com

Attorneys for USACM Liquidating Trust

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA

In re:

USA COMMERCIAL MORTGAGE
COMPANY,

USA CAPITAL REALTY ADVISORS,
LLC,¹

USA CAPITAL DIVERSIFIED TRUST
DEED FUND, LLC,

USA CAPITAL FIRST TRUST DEED
FUND, LLC,²

USA SECURITIES, LLC,³

Debtors.

Affects:

- ☐ All Debtors
- ☒ USA Commercial Mortgage Company
- ☐ USA Capital Realty Advisors, LLC
- ☐ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA Capital First Trust Deed Fund, LLC
- ☐ USA Securities, LLC

Case No. BK-S-06-10725-LBR
Case No. BK-S-06-10726-LBR¹
Case No. BK-S-06-10727-LBR
Case No. BK-S-06-10728-LBR²
Case No. BK-S-06-10729-LBR³

CHAPTER 11

Jointly Administered Under Case No.
BK-S-06-10725 LBR

**THIRD OMNIBUS OBJECTION OF
USACM TRUST TO PROOFS OF
CLAIM BASED IN PART UPON
INVESTMENT IN THE GARDENS
\$2.425 LOAN**

Date of Hearing: October 21, 2010
Time of Hearing: 9:30 a.m.
Estimated Time for hearing: 10 min.

The USACM Liquidating Trust (the "USACM Trust") moves this Court, pursuant to § 502 of title 11 of the United States Bankruptcy Code (the "Bankruptcy Code") and Rule 3007 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), for an order disallowing the Proofs of Claim listed in **Exhibit A**. These claims were filed by

¹ This bankruptcy case was closed on September 23, 2008.

² This bankruptcy case was closed on October 12, 2007.

³ This bankruptcy case was closed on December 21, 2007.

investors (“Direct Lenders”) against USA Commercial Mortgage Company (“USACM”) based upon an investment in a loan to The Gardens, LLC (“Borrower”). This loan was sometimes referred to as “The Gardens \$2.425 Loan⁴” and that is how the Trust will refer to it here. This Objection is supported by the Court’s record and the Declarations of Geoffrey L. Berman and Edward M. Burr in Support of Omnibus Objections to Proofs of Claim Based Upon the Investment in The Gardens \$2.425 Loan. (the “Berman Decl.” and “Burr Decl.”).

THIS OBJECTION DOES NOT RELATE TO AND WILL NOT IMPACT THE DIRECT LENDERS’ RIGHTS TO REPAYMENT ON THE GARDENS \$2.425 LOAN OR TO SHARE IN ANY PROCEEDS GENERATED FROM THE SALE OF THE REAL PROPERTY SECURING THE GARDENS \$2.425 LOAN.

MEMORANDUM OF POINTS AND AUTHORITIES

I. BACKGROUND FACTS

a. The USACM Bankruptcy

On April 13, 2006 (“Petition Date”), USACM filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code. Debtor continued to operate its business as debtor-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. Debtor’s post-petition management of the Debtor was under the direction of Thomas J. Allison of Mesirow Financial Interim Management, LLC, who served as the Chief Restructuring Officer.

USACM was a Nevada corporation that, prior to the Petition Date, was in the business of underwriting, originating, brokering, funding and servicing commercial loans primarily secured by real estate, both on behalf of investors and in limited instances for its

⁴ The Gardens \$2.425 Loan is distinct from the construction loan made to the Borrower on March 24, 2004, which is known as “The Gardens Timeshare Loan.” This objection will not affect any investment or claim based upon the Gardens Timeshare Loan. The Trust believes that The Gardens Timeshare Loan is currently being serviced by the Platinum Financial Trust.

own account. That business included the solicitation of investors to purchase fractional interest in loans that USACM originated and then serviced. These investors are referred to as “Direct Lenders” in USACM’s bankruptcy case and in this Objection.

On January 8, 2007, this Court entered its Order Confirming the “Debtors’ Third Amended Joint Chapter 11 Plan of Reorganization” as Modified Herein [Docket No. 2376]. As part of the Plan, and pursuant to an Asset Purchase Agreement filed with this Court, USACM sold the servicing rights to most of the loans it serviced to Compass Partners, LLC and Compass Financial Partners, LLC (“Compass”), including The Gardens \$2.425 Loan. The sale to Compass closed on February 16, 2007.

The USACM Trust exists as of the Effective Date of the Plan, which was March 12, 2007. Geoffrey L. Berman is the Trustee. Under the Plan, the USACM Trust is the successor to USACM with respect to standing to seek allowance and disallowance of Claims under 11 U.S.C. § 502(a).

Upon information derived from filings in the United States District Court, District of Nevada, *3685 San Fernando Lenders Company, LLC, et al v. Compass USA SPE, LLC, et al*, No. 2:07-cv-00892-RCJ-GWF action, the Trust believes that “Silar Advisors, LP (“Silar”) financed Compass’ acquisition of the Purchased Assets, including the loan service agreements in the USACM bankruptcy case and took a secured interest in those Purchased Assets by executing a Master Repurchase Agreement (“Repurchase Agreement”) with Compass, and by filing a UCC-1 financing statement with the State of Delaware.” *Id.* Docket 1250 at 13-14 (citations to declarations omitted).

Further, from filings in the same action, the Trust believes that “Effective as of September 26, 2007, Silar foreclosed on Compass through Asset Resolution LLC (“Asset Resolution”) and took ownership of the Purchased Assets. ... Silar created Asset Resolution as a ‘single purpose entity,’ conveyed all of its interests in the Repurchase Agreement to Asset Resolution, and Asset Resolution properly foreclosed on the assets of

Compass, including the Purchased Assets.” (Citations omitted.) Asset Resolution LLC is now a debtor in a chapter 7 bankruptcy case pending in Nevada, case no. BK-S-09-32824-RCJ, along with certain affiliates.⁵ William A. Leonard, Jr. was appointed trustee in the Asset Resolution case.

The Trust has attempted to monitor loan collections through monitoring the district court litigation and the Asset Resolution bankruptcy case, but has received limited information concerning servicing and resolution of direct loans by Compass/Silar/Asset Resolution or their successors, including the trustee in bankruptcy for Asset Resolution. The following is the extent of the USACM Trust’s information on current services for The Gardens \$2.425 Loan.

The Trust notes that by Order entered on June 24, 2010 by the Hon. Robert C. Jones in United States Bankruptcy Court (Case No. BK-S-09-32824-RCJ), the servicing rights for 19 loans were transferred to Cross, FLS. The Gardens \$2.425 Loan servicing rights were transferred to Cross, FLS by that Order.

b. The Gardens \$2.425 Loan

Around July 2005, USACM circulated an Offer Sheet to prospective Direct Lenders soliciting funding for an acquisition and development loan to a borrower identified as “The Gardens, LLC.” A copy of the Offer Sheet is attached hereto as **Exhibit B** and incorporated by this reference. (Berman Decl., ¶ 4.) The total loan amount proposed was \$2,425,000. The loan proceeds were to be used by Borrower to refinance and complete construction of a 164 unit time share development located on 7.5 acres in Orlando, Florida. The Offer Sheet described the investment as a “First Trust Deed Investment” and

⁵ 10 90 SPE LLC, Fiesta Stoneridge LLC, CFP Gramercy SPE LLC, Bundy 2.5 Million SPE LLC, CFP Cornman Toltec SPE LLC, Bundy Five Million LLC, Fox Hills SPE LLC, HFAH Monaco SPE LLC, Huntsville SPE LLC, Lake Helen Partners SPE LLC, Ocean Atlantic SPE LLC, CFP, Gess SPE LLC, CFP Anchor B SPE LLC, and Shamrock SPE LLC. The court docket and Bankruptcy Schedules filed for Huntsville SPE LLC in BK-S-09-32824-RCJ indicate that the debtor holds title to the real property that secured the Huntsville Loan through a tax lien foreclosure. The summary of schedules indicates that the value of the property is \$2,375,000 and the total amount of secured claims scheduled was \$6,002,724.53.

1 noted that the investment would be secured by a first deed of trust on approximately 7.5
2 acres of land and a subordinated deed of trust on an adjacent property called the
3 Parliament House and 18 other time share units being developed by Parliament Partners.

4 The Offer Sheet indicated that the loan would be repaid through the sale of time
5 share units and indicated that the loan to value ratio would be approximately 66%
6 including the value of additional collateral. This loan to value ratio is supported by an
7 appraisal prepared by Integra Realty Resources, Orlando dated August 22, 2005.

8 On August 15, 2005, Borrower made and delivered to various lenders, including the
9 Direct Lenders identified in **Exhibit A**, a “Promissory Note Secured by Mortgage” (the
10 “Note”) and a Loan Agreement (Berman Decl., ¶6.) The Note and Loan Agreement
11 provided for a loan in the initial principal amount of \$2,425,000. The loan was intended to
12 refinance, and provide funds to complete, the development of time share condominiums.
13 (Berman Decl., ¶6.) The Note was secured by two documents entitled “Mortgage,
14 Security Agreement and Assignment of Rents” (“Mortgages”) that were recorded in the
15 official records of Orange County, Florida on August 24, 2005. (Berman Decl., ¶ 6.) The
16 USACM Trust is aware of no evidence that USACM offered to or execute any guaranty of
17 the Direct Lenders’ Investment in this loan. (Berman Decl., ¶ 6.)

18 Pursuant to its terms, the note was scheduled to mature on August 28, 2006.
19 According to the USACM “Loan Summary” filed in this case, Borrower was performing
20 on the Note as of July 31, 2006. (Berman Decl., ¶ 7.) The USACM “Loan Summary”
21 dated February 28, 2007 filed in this case indicated that the Borrower was in default by
22 that date. (Berman Decl., ¶ 7.) At that time, USACM’s records indicated that the unpaid
23 principal balance was \$1,925,000.

24 Based upon a search of the Orange County, Florida public records it appears that
25 the rights of the mortgagees for both Mortgages were assigned to Asset Resolution, LLC
26 on November 24, 2008. (Berman Decl., ¶ 8.) It appears that the original mortgagors still

1 hold title to the two properties securing the Loan, but that tax liens may have been
2 recorded.

3 During this bankruptcy case through the transfer of servicing to Compass, USACM
4 treated the Direct Lenders with respect to any interim payments by the borrower in
5 accordance with this Court's orders and the confirmed Plan. The USACM Trust has not
6 been able to determine the ultimate disposition of The Gardens \$2.425 Loan, the collateral
7 securing that loan or whether the Direct Lenders were, or may eventually be, repaid in
8 whole or in part. (Berman Decl., ¶ 9.)

9 **c. Lenders' Claims On The Gardens \$2.425 Loan.**

10 **Exhibit A**, attached, lists Proofs of Claim filed by Direct Lenders that appear to be
11 based upon an investment in The Gardens \$2.425 Loan. (Burr Decl. ¶ 7.) **Exhibit A**
12 identifies the Proof of Claim number, the claimant, the claimant's address, the total
13 amount of the claim and the total amount of the claim that appears to be related to an
14 investment in the The Gardens \$2.425 Loan based upon the information provided by the
15 claimant. (Burr Declaration ¶ 7.) The claims listed in **Exhibit A** are referred to
16 hereafter as the "The Gardens \$2.425 Claims." As required by Nevada LR 3007, a copy
17 of the first page of the proof of claim for each of the above-referenced claims are attached
18 as **Exhibit C**.

19 **II. JURISDICTION**

20 The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and
21 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core
22 proceeding under 28 U.S.C. § 502 and Bankruptcy Rule 3007.

23 The statutory predicates for the relief requested herein are 11 U.S.C. § 502 and
24 Bankruptcy Rule 3007.
25
26

III. APPLICABLE AUTHORITY

Under the Bankruptcy Code, any Claim for which a proof of claim has been filed will be allowed unless a party in interest objects. If a party in interest objects to the proof of claim, the Court, after notice and hearing, shall determine the amount of the Claim and shall allow the Claim except to the extent that the Claim is “unenforceable against the debtor . . . under any . . . applicable law for a reason other than because such claim is contingent or unmatured.” 11 U.S.C. § 502(b). A properly filed proof of claim is presumed valid under Bankruptcy Rule 3001(f). However, once an objection to the proof of claim controverts the presumption, the creditor ultimately bears the burden of persuasion as to the validity and amount of the claim. *See Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (9th Cir. B.A.P. 1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996).

IV. THE OBJECTION

The Gardens \$2.425 Loan appears to have been a legitimate, arms-length transaction. In addition, the Direct Lenders took a known risk by investing in a promissory note secured by liens on real property.

The Direct Lenders listed in **Exhibit A** fail to state a claim based upon The Gardens \$2.425 Loan because USACM did not guarantee the Direct Lenders’ investment in The Gardens \$2.425 Loan.

USACM is not liable for the Borrower’s default or any decrease in the value of the collateral.

The Direct Lenders fail to state a claim because USACM does not appear to have breached the loan servicing agreements with respect to collection of The Gardens \$2.425 Loan. USACM was under no duty to foreclose on the collateral securing The Gardens \$2.425 Loan or take any other action.

1 This objection will not affect the Direct Lenders' right to be repaid on The Gardens
2 \$2.425 Loan by the Borrower or to recover from the sale of any collateral that secured The
3 Gardens \$2.425 Loan.

4 **V. CONCLUSION**

5 The USACM Trust respectfully requests that the Court disallow the claims against
6 USACM listed in **Exhibit A** in part because those claims are based in part upon an
7 investment in The Gardens \$2.425 Loan. This objection concerns only The Gardens
8 \$2.425 Loan and not any other claims of any of the Direct Lenders. The USACM Trust
9 also requests such other and further relief as is just and proper.

10 Dated: September 9, 2010.

11 LEWIS AND ROCA LLP

12
13 By s/John Hinderaker (AZ 18024)
14 Robert M. Charles, Jr., NV 6593
15 John Hinderaker, AZ 18024 (*pro hac vice*)
16 Marvin Ruth, NV 10979
3993 Howard Hughes Parkway, Suite 600
Las Vegas, Nevada 89169
E-mail: JHinderaker@lrlaw.com
Attorneys for the USACM Liquidating Trust

17 Copy of the foregoing and pertinent
18 portion of Exhibits mailed by first
19 class postage prepaid U.S. Mail on
20 September 9, 2010 to all parties listed on
21 Exhibit A attached.

22 LEWIS AND ROCA LLP

23 s/ Leilani Ebanks
24
25
26